

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 5672
DATE COMPLAINT FILED: July 28, 2005
DATE OF NOTIFICATION: August 1, 2005
LAST RESPONSE RECEIVED: September 21, 2005
DATE ACTIVATED: April 17, 2006

EXPIRATION OF SOL: December 12, 2009

COMPLAINANT:

Stamm, Reynolds & Stamm

RESPONDENTS:

Save American Jobs Association, Inc.
Jack Davis for Congress and Robert R. Davis, in his official
capacity as treasurer
I Squared R Element Company, Inc.
Save Jobs Party and Jack Davis, in his official capacity as
treasurer
John "Jack" R. Davis, Jr., in his personal capacity

MUR: 5733
DATE COMPLAINT FILED: April 17, 2006
DATE OF NOTIFICATION: April 24, 2006
LAST RESPONSE RECEIVED: June 14, 2006
DATE ACTIVATED: June 19, 2006

EXPIRATION OF SOL: March 2, 2010

COMPLAINANT:

Henry F. Wojtaszek

RESPONDENTS:

John "Jack" R. Davis, Jr., in his personal capacity
Jack Davis for Congress and Robert R. Davis, in his official
capacity as treasurer
I Squared R Element Company, Inc.
Save American Jobs PAC
Jack Davis Exploratory Committee, Inc.
Davis for Congress and Alan J. Davis, in his official
capacity as treasurer

RELEVANT STATUTES:

2 U.S.C. § 431(2)
2 U.S.C. § 431(4)
2 U.S.C. § 431(8)(A)(i)
2 U.S.C. § 431(9)(A)(i)
2 U.S.C. § 432(e)(1)
2 U.S.C. § 433
2 U.S.C. § 434(a)
2 U.S.C. § 434(b)
2 U.S.C. § 441a
2 U.S.C. § 441a(f)
2 U.S.C. § 441b
2 U.S.C. § 441d
2 U.S.C. § 441d(c)(2)
11 C.F.R. § 100.3
11 C.F.R. § 100.5(g)(5)
11 C.F.R. § 100.72
11 C.F.R. § 100.72(a)
11 C.F.R. § 100.72(b)
11 C.F.R. § 100.131
11 C.F.R. § 100.131(a)
11 C.F.R. § 100.131(b)
11 C.F.R. § 101.1
11 C.F.R. § 101.3
11 C.F.R. § 102.1(d)
11 C.F.R. § 102.5(b)(1)
11 C.F.R. § 104.1
11 C.F.R. § 104.1(a)
11 C.F.R. § 104.5(a)(1)
11 C.F.R. § 109.21
11 C.F.R. § 109.23
11 C.F.R. § 110.3(a)
11 C.F.R. § 110.11(a)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: Internal Revenue Service

I. INTRODUCTION

The complaints in these matters were filed by the law office of Stamm, Reynolds & Stamm (MUR 5672) and by Henry Wojtaszek, former Republican candidate for Congress in the 28th District of New York and current Niagara County Republican Committee Chairman (MUR

5733).¹ Both complainants make a number of allegations, but the principal allegation appears to be that Jack Davis used various entities that were within his control to promote himself and attack others to further his run for Congress in 2006 and that these entities violated the Federal Election Campaign Act of 1971, as amended, ("the Act").

As more fully set forth below, we recommend that the Commission find reason to believe that (1) Save American Jobs Association violated 2 U.S.C. § 441b by making a prohibited corporate in-kind contribution, (2) Davis for Congress (formerly known as Jack Davis Exploratory Committee, Inc.) and Alan J. Davis, in his official capacity as treasurer, violated 2 U.S.C. § 434(b) by failing to report in-kind contributions and 2 U.S.C. §§ 433 and 434(a) by failing to timely register as a committee and file required disclosure reports, and (3) Jack Davis violated 2 U.S.C. §§ 432(e)(1) and 433 by failing to timely register as a candidate and failing to timely register a committee. We recommend that the Commission dismiss the allegation that Jack Davis and Davis for Congress (formerly known as Jack Davis Exploratory Committee, Inc.) and Alan J. Davis, in his official capacity as treasurer, violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11(a) by failing to include the required disclaimer. We also recommend that the Commission find no reason to believe Davis for Congress (formerly known as Jack Davis Exploratory Committee, Inc.) and Alan J. Davis, in his official capacity as treasurer, violated 2 U.S.C. § 441b by accepting prohibited contributions. Finally, we recommend that the Commission find no reason to believe I Squared R Element, Inc., Save American Jobs PAC, the Save Jobs Party and Jack Davis, in his official capacity as treasurer, and Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, violated the Act.

¹ MURs 5672 and 5733 are addressed in a single report due to the significant overlap in respondents and the common factual bases for the allegations

1 **II. FACTUAL BACKGROUND**

2 In 2004, Jack Davis challenged Congressman Tom Reynolds as the Democratic nominee
3 for the 26th District of New York on an anti-free trade platform and lost. His principal campaign
4 committee for the 2004 election was Jack Davis for Congress. Following his defeat, he formed
5 the Save American Jobs Association and the Save Jobs Party committee to continue his message
6 against free trade. On October 12, 2005, Mr. Davis formed the Jack Davis Exploratory
7 Committee, Inc., to determine whether he should run for Congress again in 2006, and, on
8 March 23, 2006, Mr. Davis registered as a candidate for the 2006 election and designated Davis
9 for Congress as his principal campaign committee, with Alan J. Davis as treasurer (collectively,
10 "Davis 2006 Committee").²

11 Mr. Davis registered Save Jobs Party, with Jack Davis as treasurer, ("Party") with the
12 Commission as a federal political committee on March 7, 2005.³ In reports filed with the
13 Commission, the Party disclosed \$23,183.50 in receipts and \$23,148.80 in disbursements in
14 2005. The Party accepted \$21,000 in loans from Jack Davis, \$900 total contributions from eight
15 state and local committees, and \$1,283.50 in unitemized contributions. It disbursed \$2,500 to
16 Aristotle, Inc. for research software, \$3,512.98 to Matthew Bova for "consultant fees," \$5,515.61

² The complainant in MUR 5672 named the Jack Davis Exploratory Committee and Davis for Congress as respondents in this matter. While Davis for Congress is registered with the Commission and designated as Mr. Davis's principal campaign committee for this election cycle, the Exploratory Committee is not registered as a political committee. As such, it appears that the Exploratory Committee was transformed into a campaign committee and registered with the Commission as Davis for Congress. Consequently, this Report, unless otherwise specified, will refer to the respondent committee Davis for Congress, formally known as the Jack Davis Exploratory Committee, as "Davis 2006 Committee." Furthermore, to avoid confusion as there are currently four political committees registered with the Commission with the exact name "Davis for Congress," we note that the committee ID of the "Davis for Congress" respondent in this matter is C00421909.

³ Although called a "party" and referred to as "Party" in this Report, the Save Jobs Party is not a party political committee under the Act. The term "political party" is defined as an association that nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of the association. 2 U S C § 431(16). Because Save Jobs Party has not nominated a candidate for federal office, it is not a party, and, thus, its committee is not a "party political committee" under the Act.

to Curtis Ellis, Inc. for "services rendered," \$2,000 for rent, \$963.20 for phones, and \$307.81 in unitemized expenditures. It refunded \$8,350 to Davis and has \$34.70 cash on hand. On January 28, 2006, Save Jobs Party filed a Termination Report.⁴ It has not disclosed any activity in 2006.

On January 28, 2005, Mr. Davis incorporated Save American Jobs Association, Inc. ("Association") as a Section 501(c)(4) organization to continue his message against free trade. The Association has never been registered with the Commission as a political committee. He also registered Save American Jobs PAC ("SAJPAC") with the New York State Board of Elections, apparently on the same day.⁵ SAJPAC is not registered with the Commission as a political committee. Both the Association and SAJPAC share the same mailing address. In reports filed with the New York State Board of Elections, SAJPAC disclosed \$7,179.15 in total receipts, \$7,149.15 of which were from Mr. Davis. The reports also disclose \$7,177.15 in total disbursements, of which \$4,170 was for contributions to state and local candidates, \$250 was for a contribution to DAPAC (Democratic Advancement PAC), a nonconnected federal committee, \$510 appears to have been for travel costs related to a trip to meet with Democratic leadership to discuss Mr. Davis's potential run for Congress in 2006, \$199.99 was for training at the Leadership Institute, and \$590 was for airfare to and lodging in Washington, D.C. during March 2005. The remainder of the disbursements appear to have been for administrative expenses.

Jack Davis and Jack Davis for Congress filed a joint response to the complaint in MUR 5672. Jack Davis, Davis for Congress, Save American Jobs PAC, and Save Jobs Party filed a joint response to the complaint in MUR 5733. No other respondent replied to either complaint.

⁴ The request was rejected pending resolution of this matter.

⁵ The New York State Board of Elections does not list committee registration dates on its website, but the earliest reported contribution received was on January 28, 2005

1 **III. LEGAL ANALYSIS**

2 As discussed below, it appears that the Association may have violated 2 U.S.C. § 441b by
3 making a prohibited corporate contribution. It also appears that the Davis 2006 Committee may
4 have violated 2 U.S.C. § 434(b) by failing to report in-kind contributions, and violated 2 U.S.C.
5 § 433 and 2 U.S.C. § 434(a) by failing to timely register and file required disclosure reports. It
6 further appears that Jack Davis may have violated 2 U.S.C. § 432(e)(1), and 2 U.S.C. § 433 by
7 failing to timely register as a candidate and register a principal campaign committee. Finally,
8 there is no information to suggest that I Squared R Element, Inc., the Party, SAJPAC, and Jack
9 Davis for Congress and Robert R. Davis, in his official capacity as treasurer, violated the Act.⁶

10 **A. SAVE JOBS PARTY**

11 1. Failure to disclose certain expenditures or comply with the Act's source prohibitions

12 The complainant in MUR 5733 alleges that the Party either failed to disclose
13 expenditures for a "Save Jobs Party Fundraiser" it held at a restaurant or, in the alternative, if it

⁶ The complainants also make several assertions that lack sufficient factual basis or particularity to infer an allegation. For example, the complainant in MUR 5733 alleges that the websites of the Jack Davis Exploratory Committee, the Jack Davis for Congress committee, and the Association "bear a striking resemblance to [each other]." The complainant in MUR 5672 alleges that Mr. Davis sent an email from his campaign email address to his campaign list announcing the formation of the Association. The complainant in MUR 5672 also alleges that I Squared R Element, Mr. Davis's privately held corporation, "lobbied for the defeat of [free trade] legislation before the House of Representatives" and that, because this "anti-trade rhetoric" was central to his campaign, this lobbying somehow is evidence of a violation of the Act. Because these assertions do not provide sufficient information to infer or support an allegation that the Act may have been violated, we do not make recommendations as to them.

The complainants also make allegations that appear to be outside the scope of the Act. Most notably, the complainant in MUR 5672 challenges the 501(c)(3) tax status of the Save American Jobs Association ("SAJA"), and the complainant in MUR 5733 alleges a number of violations of state campaign finance law. We do not make a recommendation regarding these allegations.

Finally, the complainant in MUR 5733 alleges that the Party and SAJPAC are 527 organizations and claims that "the Commission promulgated new regulations designed to require such groups, in the event they participate in the federal election process, to register, report and abide by federal election law." Complaint, MUR 5733. It appears that the complainant is alleging violation of proposed regulations that were never adopted by the Commission. See Explanation and Justification, Political Committee Status, 69 Fed. Reg. 68056 (Nov. 23, 2004). Furthermore, neither is organized under Section 527 of the Internal Revenue Code. Thus, we make no recommendation regarding these allegations.

was not charged for the fundraiser, received prohibited in-kind contributions from the restaurant.

2 The complainant also alleges that the Party received contributions from nine entities that accept
3 money from prohibited sources. In its response, the Party claims that it did not engage in any
4 federal campaign activity and that it mistakenly registered with the Commission as the result of
5 "an administrative error made by a staff person who misunderstood the law." Response, MUR
6 5733, at 2. As such, the Party appears to assert that it was not required to disclose its activity to
7 the Commission and should not be subject to the Act's source prohibitions.

8 The Act requires political committees to register and report with the Commission and to
9 comply with the contribution prohibitions and limitations of the Act. 2 U.S.C. § 433; *see also*
10 11 C.F.R. §§ 102.1(d), and 104.1(a). "Political committee" is defined as a committee that
11 receives contributions or makes expenditures in excess of \$1,000 within a calendar year.⁷
12 2 U.S.C. § 431(4). A contribution is defined as a gift, subscription, loan, advance, or deposit of
13 money or anything of value made for the purpose of influencing any election for federal office;
14 an expenditure is defined as a purchase, payment, distribution, loan, advance, deposit, or gift of
15 money or anything of value made for the purpose of influencing any election for Federal office.
16 *See* 2 U.S.C. § 431(8)(A)(i), (9)(A)(i).

17 In this case, the Party registered as a political committee with the Commission, but there
18 is no information demonstrating that it meets the statutory threshold. The Commission has found
19 that the Act does not apply to registered entities that do not meet the statutory definition of
20 "political committee." *See, e.g.,* RR 96L-09 (Club 96) (Commission concluded an organization
21 that registered as a political committee and fabricated all of its reports of disbursements and

⁷ To address overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79 (1976), *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986).

1 receipts did not violate the Act, because the organization was not a political committee under the
2 Act, since it did not actually receive more than \$1,000 in contributions or expenditures:
3
4 *cf.* MUR 4981 (Claspill for
5 Congress) (Commission took no further action with respect to a "candidate" who fabricated all of
6 his reported contributions and expenditures, because the individual did not exceed the statutory
7 thresholds, was not actually a candidate and, therefore, was not subject to the contribution
8 limitations and reporting requirements of the Act).

9 Available information indicates that the Party has engaged only in state and local political
10 activity. Specifically, the complainants attached flyers distributed by the Party demonstrating
11 that the Party engaged in state and local activity, and news reports about the Party's activities
12 suggest it engaged in only state and local activity.⁸ Furthermore, there is no available
13 information indicating that the Party made any contributions to federal candidates or other
14 political committees, that it expressly advocated the election or defeat of a clearly identified
15 federal candidate, that it made disbursements for any public communications referring to a
16 federal candidate, or that it received contributions in response to solicitations clearly indicating
17 that the funds received would be targeted to the election or defeat of a federal candidate.

18 Because no information suggests that the Party met the statutory thresholds for "political
19 committee," it does not appear that the Party is subject to the reporting requirements and
20 contribution prohibitions of the Act. We recommend that the Commission find no reason to

⁸ MUR 5733 Complaint, Exhibit J, Robert J. McCarthy, *Ranzenhofer seeks probe over calls to voters*, NEWS
POLITICAL REPORTER, September 12, 2005, at B3, Rich Kellman, *Fraud! Or is it?*, MUR 5733 Complaint, Exhibit I,
September 13, 2005, *Legislative Candidates Point Fingers Over Automated Message*, MUR 5733 Complaint,
Exhibit I, September 12, 2005

believe the Save Jobs Party and Jack Davis, in his official capacity as treasurer, violated 2 U.S.C.

§ 433, 11 C.F.R. § 102.1(d), or 11 C.F.R. § 104.1(a).

2. Other Allegations Against the Party

The complainants make a number of other allegations that are all predicated on the assumption that the Party is a political committee, as defined by the Act. The complainant in MUR 5733 alleges that the Party failed to adequately identify the purpose for its expenditures in its disclosure reports, citing a Request For Additional Information sent to the Party by the Commission. 2 U.S.C. § 434(b)(5)(a). The complainant in MUR 5733 also alleges that the Party violated 2 U.S.C. § 441a(f) by knowingly receiving excessive contributions from Jack Davis, and that Mr. Davis violated 2 U.S.C. § 441a(a)(1) by making the contributions. The complainant in MUR 5672 alleges that the Association provided the Party the use of the Association's mailing list to send out announcements and that the Party shared office space with the Association, in violation of 2 U.S.C. § 441b. The complainant in MUR 5733 also alleges that the Party shared office space with the Association and further alleges that the Party shared office space with I Squared R Element, Mr. Davis's corporation, also in violation of 2 U.S.C. § 441b. Because the Party does not appear to be a political committee as defined by the Act, we recommend that the Commission find no reason to believe any of these respondents violated the Act in connection with these allegations.

B. SAVE AMERICAN JOBS ASSOCIATION

The complainant in MUR 5672 alleges that the Association made prohibited in-kind corporate contributions to Mr. Davis's campaign, the Davis 2006 Committee, and that the Davis 2006 Committee knowingly accepted these prohibited contributions. 2 U.S.C. § 441b. The complainant alleges that the Association hosted a video of Mr. Davis on its website in which he

1 states, "I am running for Congress to save jobs, farms and industries When I'm elected, I'll
2 work to scrap any programs that encourage [overseas outsourcing] I will vote against any
3 new free trade agreements." Complaint, MUR 5672, Exhibit 11. In his response, Mr. Davis does
4 not deny the video was on the Association's website, instead explaining that this video is left
5 over from his 2004 congressional campaign and asserts that the "linked video is not general
6 public political advertising, it does not publicize his intent to campaign for Federal office, and
7 the link costs far less than \$5,000." Response, at 2. The video link no longer appears on the
8 Association's website, and the website itself appears to be dismantled.

9 Mr. Davis claims that, since he was not a candidate at the time of these activities or at the
10 time of the complaint, he could not have violated the Act as alleged. However, because he is
11 now a candidate under the Act, Mr. Davis's candidacy status at the time of these in-kind
12 contributions is not dispositive if he was exploring the feasibility of becoming a candidate.
13 Under the "testing the waters" regulations, an individual who is exploring the feasibility of
14 becoming a candidate must nevertheless comply with the Act's contribution limitations and
15 source prohibitions during the "testing the waters" period. *See* 11 C.F.R. §§ 100.72, 100.131; *see*
16 *also* Advisory Opinion 1998-18 (Washington State Democratic Party). Further, if the individual
17 ultimately decides to become a candidate and exceeds \$5,000 in either contributions or
18 expenditures, the individual must retroactively disclose in his or her committee's first report filed
19 with the Commission all funds received and paid during the "testing the waters" period that
20 would have been contributions and expenditures but for the "testing the waters" exemption. *See*
21 11 C.F.R. §§ 100.72 and 100.131; *see also* Advisory Opinion 1984-38 (Oberstar) (once an
22 individual becomes a candidate, "testing the waters" regulations make disclosure requirements
23 retroactive to the moment candidate first started testing).

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According to an article published in Roll Call on March 2, 2005, Mr. Davis met with Democratic Congressional Campaign Committee Chairman Rahm Emmanuel and other Democratic representatives in mid-February in Washington, D.C., to “discuss a possible rematch with Reynolds.” Complaint, MUR 5672, Exhibit 12 (“I said, ‘If I run will you help?,’ and [Emmanuel] said, ‘Yes.’”). Meeting with ranking Democrats to determine the level of support within the Democratic party would appear to be, by definition, “testing the waters” activity.⁹ Because there is no information available indicating that Mr. Davis engaged in any “testing the waters” activity prior to these meetings, it appears that Mr. Davis began testing the waters by, at the latest, mid-February 2005. Accordingly, any money spent after that point to further Mr. Davis’s exploratory efforts or candidacy should have complied with the contribution limitations and prohibitions of the Act, including the prohibition against corporate contributions and expenditures set forth in 2 U.S.C. § 441b.

Mr. Davis admits that the video was produced by his campaign committee, and neither Mr. Davis nor the Association denies that the video appeared on the Association’s website at the Association’s cost. The republication of any campaign materials prepared by the candidate’s authorized committee is a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure. 11 C.F.R. § 109.23. Thus, the information currently available suggests that the Association may have violated 2 U.S.C. § 441b by making a prohibited corporate contribution to the Davis 2006 Committee. While there is no information indicating how long the link appeared on the website, in any event, the associated costs were likely *de minimis*. See MUR 5523 (Plumbers 12) (Commission dismissed the

⁹ Testing the waters activity includes conducting a poll, telephone calls, and travel for the purpose of determining whether to become a candidate. 11 C.F.R. §§ 100.72(a) and 100.131(a).

1 complaint as to labor organization that solicited contributions on its website because of the small
2 amount of traffic to the solicitation page and the organization's prompt removal of the material in
3 question); MUR 5522 (WRTL) (Commission found reason to believe violation occurred, but
4 took no further action other than to admonish a corporate respondent that posted endorsement on
5 its website, due to *de minimis* costs associated with the violation and because the corporation did
6 not publicize endorsement); MUR 4686 (New York State AFL-CIO 1999) (Commission found
7 reason to believe violation occurred, but took no further action as to labor organization that
8 posted endorsement on its website because of relative difficulty in locating the endorsements on
9 the Internet and *de minimis* costs associated with the violation). Accordingly, we recommend
10 that the Commission find reason to believe that the Save American Jobs Association violated
11 2 U.S.C. § 441b, admonish the respondent, and take no further action.

12 However, the candidate who prepared the materials does not receive or accept an in-kind
13 contribution unless the republication of the materials is a coordinated communication under
14 11 C.F.R. § 109.21. *Id.* Because the Association appears to have republished the video on its
15 website only, the republication does not satisfy the then-existing test for coordinated
16 communications.¹⁰ Accordingly, we recommend that the Commission find no reason to believe
17 that Davis for Congress (formerly known as Jack Davis Exploratory Committee, Inc.) and Alan J.

¹⁰ To be a coordinated communication, a communication must be paid for by a person other than the candidate, authorized committee, or party committee and must satisfy both the content and conduct standards. 11 C.F.R. § 109.21(a). To satisfy the content standards, the communication must, *inter alia*, be either a public communication or an electioneering communication. 11 C.F.R. § 109.21(c). At the time of the activity in question, communications over the Internet were excluded from the definition of public communications. 11 C.F.R. § 100.26. Electioneering communications have always been limited to the broadcast, cable, and satellite media 11 C.F.R. § 100.29

Davis, in his official capacity as treasurer, violated 2 U.S.C. § 441b by knowingly accepting a prohibited in-kind contribution from the Association.¹¹

C. SAVE AMERICAN JOBS PAC

The complainant in MUR 5733 alleges that the Save American Jobs PAC ("SAJPAC") made prohibited in-kind contributions to Mr. Davis's campaign by paying for portions of Mr. Davis's campaign travel costs and that the Davis 2006 Committee knowingly received the contributions. *See* 2 U.S.C. § 441b. An organization that is not a political committee under the Act and that is not a prohibited source may make a contribution to a federal committee if it can demonstrate through a reasonable accounting method that it had sufficient funds subject to the limitations and prohibitions of the Act at the time of the contribution. 11 C.F.R. § 102.5(b)(1).

Disclosure reports filed by SAJPAC with the New York State Board of Elections reveal a disbursement in February 2005 for \$510 for car rental during the same period of time that Mr. Davis was in Washington discussing his potential campaign with Democratic party leaders. The state disclosure reports also reveal several disbursements for what appear to be federal campaign activity, including \$199.99 for training at the Leadership Institute and \$590 for airfare to and lodging in Washington, D.C. during March 2005. However, SAJPAC appears to have had sufficient funds subject to the limitations of the Act to pay for the approximately \$1,300 in disbursements, including \$2,100 in individual contributions from Mr. Davis.¹² *See* 2 U.S.C. § 441a(a)(1)(A). For this reason, we recommend that the Commission find no reason to believe that the Save American Jobs PAC and Davis for Congress (formerly known as Jack Davis

¹¹ The complainant also alleges that the Association paid for Mr. Davis's travel costs associated with his trip to Washington, D C in mid-February. However, these disbursements were made by the Save American Jobs PAC, and, accordingly, are discussed in the next section, which addresses the Save American Jobs PAC. *See* Section III.C

¹² Mr. Davis contributed nearly all of SAJPAC's \$7,179.15 in total receipts.

1 Exploratory Committee, Inc.) and Alan J. Davis, in his official capacity as treasurer, violated
2 2 U.S.C. § 441b by making and receiving prohibited corporate contributions.

3 The response contends that the disbursements were solely for state and local campaign
4 activity and, thus, were not in-kind contributions to the committee. However, available
5 information indicates that the \$510 disbursement may have paid for Mr. Davis's travel to
6 Washington, D.C. during the time period he met with Democratic leader to discuss whether or
7 not he should run for Congress. If one of the purposes of his trip was to test the waters to see if
8 he should run for Congress, then the Davis 2006 Committee was required to disclose at least
9 some portion of these disbursements as in-kind contributions in the first report it filed with the
10 Commission. 2 U.S.C. § 434(b); 11 C.F.R. §§ 100.72(a) and 100.131(a); MUR 4323 (Huckabee)
11 (a portion of the disbursements made by a state committee to finance travel costs of a potential
12 candidate that included a stop for testing the waters activities became in-kind contributions once
13 the individual became a candidate); Advisory Opinion 1986-26 (Nat'l Conservation Found.)
14 (expenses for campaign-related travels, including testing the waters activities, constitute
15 campaign expenditures). The same would apply to the \$590 disbursement for airfare to
16 Washington, D.C. Because the Davis 2006 Committee does not appear to have disclosed any of
17 these travel expenses in its first report, we recommend that the Commission find reason to
18 believe that Davis for Congress (formerly known as Jack Davis Exploratory Committee, Inc.) and
19 Alan J. Davis, in his official capacity as treasurer, violated 2 U.S.C. § 434(b) by failing to report
20 in-kind contributions.

D. JACK DAVIS

1. Failure to Register and Report

The complainant in MUR 5733 alleges that Mr. Davis failed to register and report his activities with the Commission after becoming a candidate under the Act. *See* 2 U.S.C. § 433; 11 C.F.R. §§ 101.1 and 104.1, *et seq.* Although Mr. Davis registered with the Commission as a candidate and designated the Davis 2006 Committee as his principal campaign committee on March 23, 2006, six days prior to the date of the complaint, it appears he may have become a candidate under the Act as early as November 2005, which would have required Mr. Davis and the Davis 2006 Committee to register at least four months earlier than they did. This would have also required the Davis 2006 Committee to file a 2005 Year-End Report, and possibly earlier reports depending on the exact date Mr. Davis became a candidate, which it failed to do.

“Candidate” is defined by the Act as an individual who has received contributions or made expenditures in excess of \$5,000. 2 U.S.C. § 431(2). Candidate status under the Act is not dependent upon filing a Statement of Candidacy; it is based solely on exceeding the contribution or expenditure thresholds. 11 C.F.R. § 100.3; *see* Explanation and Justification, Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9992-93 (Mar. 13, 1985). As discussed above, funds spent to “test the waters” do not count toward the contribution and expenditure thresholds until the individual decides to become a candidate. *See supra* Section III.B.2. However, once an individual decides to become a candidate and exceeds the thresholds, the principal committee must disclose all campaign activity that has occurred to date in the first report it files with the Commission. 11 C.F.R. § 101.3; *see* Explanation and Justification, Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992 (Mar. 13, 1985).

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1 The "testing the waters" exemption to contributions and expenditures is narrowly tailored
2 and does not cover activity that constitutes campaigning for Federal office. Explanation and
3 Justification, Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992 (Mar. 13,
4 1985). The end of the "testing the waters" phase is signaled by examining the individual's intent
5 – once he or she has decided to become a candidate, the individual may no longer claim the
6 exemption and, at that point, all receipts and disbursements are treated as contributions and
7 expenditures counting toward the threshold. *See* MUR 5480 (Levetan for Congress) ("testing the
8 waters" phase of Ms. Levetan's candidacy ended on the date that she announced her intention to
9 seek office); MUR 5363 (Sharpton) (Mr. Sharpton's "testing the waters" phase ended upon
10 publishing a book that unequivocally referred to himself as a candidate for President); Advisory
11 Opinion 1981-32 (Askew) ("[If any] activities take place in a factual context indicating that
12 Governor Askew has moved beyond the deliberative process of deciding to become a candidate,
13 and into the process of planning and scheduling public activities designed to heighten his
14 political appeal to the electorate, then it is the Commission's opinion that the activity would cease
15 to be within the exemption, and candidacy would arise.").

16 Because intent is often inferred from actions, the Commission will also look to whether
17 the individual (1) raised funds in excess of what could reasonably be expected to be used for
18 exploratory activities or undertaking activities designed to amass campaign funds that will be
19 spent after he or she becomes a candidate, (2) employed general public political advertising to
20 publicize his or her intention to campaign for federal office, (3) made or authorized written or
21 oral statements that refer to him or her as a candidate for a particular office, (4) conducted
22 activities in close proximity to the election or over a protracted period of time, and (5) took

actions necessary to qualify for the ballot. 11 C.F.R. §§ 100.72(b) and 100.131(b); *see* MUR 5480 (Levetan for Congress); MUR 5363 (Sharpton); AO 1981-32 (Askew).

Mr. Davis reportedly made statements as early as March 2, 2005, that indicate his intent to campaign for federal office. In conversations with the author of a Roll Call article on that date, Mr. Davis “appeared to slip up at least two times, saying, ‘the fact that I’m running again’ and ‘when I run again’ – though he quickly corrected himself.” Complaint, MUR 5672, Exhibit 12. Because the “testing the waters” exemption is narrowly tailored to “permit individuals to conduct certain activities while deciding *whether* to become a candidate for federal office,”¹³ (emphasis added) and is not intended to allow candidates to campaign without disclosing contributions and expenditures, it is unpersuasive that Mr. Davis “corrected himself” – the statements attributed to him suggest that, as of the date of the interview, Mr. Davis may have decided to become a candidate for Federal office. Furthermore, Mr. Davis appears to have been cognizant of the benefits in delaying the announcement of his candidacy. In the same March 2, 2005, Roll Call article, Mr. Davis commented, “[as] soon as I announce [my candidacy], then I’m shut off from so many people Now I’m invited to speak to groups.” *Id.* All of these statements indicate Mr. Davis may have decided to become a candidate as of March 2, 2005. Deciding to become a candidate, however, only ends the individual’s “testing the waters” phase – the individual does not become a “candidate” under the Act unless and until the individual receives contributions or makes expenditures in excess of \$5,000. *See* 2 U.S.C. § 431(2).

The complainant cites a number of activities between January 4 and March 27, 2006, as evidence that Mr. Davis exceeded the \$5,000 threshold for expenditures and, therefore, became a

¹³ Explanations and Justifications, Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992 (Mar 13, 1985)

1 candidate sometime during that period.¹⁴ An expenditure is anything of value made by any
2 person for the purpose of influencing any election for Federal office. 2 U.S.C. § 441b.
3 According to his campaign's disclosure reports, however, Mr. Davis may have exceeded the
4 threshold earlier than January 4, 2006. In its 2006 April Quarterly Report, the Davis 2006
5 Committee revealed that Mr. Davis exceeded the \$5,000 threshold no later than November 22,
6 2005, when he made a \$7,280 payment to MLB Research Associates for "political market
7 research."

8 The disbursement to MLB Research appears to be a campaign expenditure, which would
9 have made Mr. Davis a candidate as of November 2005 at the latest and would have required the
10 Davis 2006 Committee to file at least a 2005 Year-End Report. 11 C.F.R. § 104.5(a)(1). This
11 expenditure would have also required Mr. Davis to file a Statement of Candidacy by December
12 7, 2005, and required either he or the Davis 2006 Committee to file a Statement of Organization
13 registering a principal committee within ten days after that. 2 U.S.C. §§ 432(e)(1) and 433.

14 Because the Statement of Candidacy and Statement of Organization were not filed until
15 March 23, 2006, and the Davis 2006 Committee did not file a 2005 Year-End Report at all, we
16 recommend that the Commission find reason to believe Jack Davis violated 2 U.S.C.
17 §§ 432(e)(1) and 433 and Davis for Congress (formerly known as Jack Davis Exploratory
18 Committee, Inc.) and Alan J. Davis, in his official capacity as treasurer, violated 2 U.S.C. §§ 433
19 and 434(a).

¹⁴ The complainant claims that Davis exceeded \$5,000 in contributions or expenditures and that an announcement by the "Jack Davis Exploratory Committee" carrying the disclaimer "Paid for by Davis for Congress" is express advocacy which, as a matter of law, makes Davis a candidate. It is not necessary to address whether a disclaimer is evidence of an individual's intent to become a candidate, because the email was sent on March 27, 2006, four days after Mr. Davis had already registered as a candidate with the Commission.

2. Disclaimer Violation

2 The complainant in MUR 5733 alleges that an email communication sent by Mr. Davis's
3 campaign did not contain a disclaimer as required by 2 U.S.C. § 441d.¹⁵ Complaint, MUR 5733,
4 Exhibit E. The email, sent on March 27, 2006, announces Mr. Davis's candidacy and contains
5 the disclaimer "Paid for by Davis for Congress," which is set apart from the rest of the
6 communication as required by 2 U.S.C. § 441d. The disclaimer is not, however, contained
7 within a printed box. 2 U.S.C. § 441d(c)(2).

8 Nonetheless, there is not sufficient information to establish that a disclaimer was required
9 for this email communication. Under Commission regulations at the time, a disclaimer was
10 required for an email communication when the email was sent unsolicited to more than 500
11 addresses. 11 C.F.R. § 110.11(a). There is no information available indicating this email was
12 unsolicited or that it was sent to more than 500 persons. Accordingly, we recommend that the
13 Commission exercise its prosecutorial discretion and dismiss the allegation that Jack Davis and
14 Davis for Congress (formerly known as Jack Davis Exploratory Committee, Inc.) and Alan J.
15 Davis, in his official capacity as treasurer, violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11(a).¹⁶

16 **E. AFFILIATION**

17 The complainant in MUR 5733 alleges that "all of [Mr. Davis's] entities are affiliated"
18 and that they received excessive contributions by violating the shared contribution limits for
19 affiliated committees. 2 U.S.C. § 441a; *see* 11 C.F.R. § 110.3(a). Presumably, the complainant

¹⁵ The complainant also asserts that the only committee by the name "Davis for Congress" registered with the Commission belongs to Representative Danny Davis of Illinois. However, Jack Davis filed his Statement of Candidacy and registered "Davis for Congress" as his committee with the Commission on March 23, 2006.

¹⁶ Even if a disclaimer was required, the Commission recently declined to find reason to believe that a principal campaign committee violated the Act by failing to place a website disclaimer in a printed box, due to the complexities of how the electronic medium translates to the print medium and the concerns over whether Congress intended to include the internet in the media covered by 2 U.S.C. § 441d(c). MUR 5526 (Graf for Congress)

1 is referring to the Party, the Association, and the Davis 2006 Committee. Neither the Party nor
2 the Association appears to be a "political committee" under the Act, and, thus, could not be
3 "affiliated" with each other. *See supra*. Furthermore, the Davis 2006 Committee cannot be
4 affiliated with either the Party or the Association because an authorized committee can only be
5 affiliated with another authorized committee. 11 C.F.R. § 100.5(g)(5). Thus, we recommend
6 that the Commission find no reason to believe the Save Jobs Party and Jack Davis, in his official
7 capacity as treasurer, the Save American Jobs Association, and Davis for Congress (formerly
8 known as Jack Davis Exploratory Committee, Inc.) and Alan J. Davis, in his official capacity as
9 treasurer, violated 2 U.S.C. § 441a by exceeding the contribution limits for affiliated committees.

10 IV. DISCOVERY

11 We anticipate that the focus of an investigation will be to identify the expenditures made
12 and contributions received by Mr. Davis or his campaign between mid-February 2005 (when he
13 began testing the waters) and December 31, 2005 (the last day of the reporting period prior to the
14 period for which his campaign filed its first disclosure report) that should have been disclosed in
15 reports filed with the Commission and to obtain evidence to aid the Commission in confirming
16 the dates on which Mr. Davis began testing the waters and became a candidate.

20 V. RECOMMENDATIONS

- 21 1. Find no reason to believe the Save Jobs Party and Jack Davis, in his official capacity
22 as treasurer, violated 2 U.S.C. § 433, 11 C.F.R. § 102.1(d), or 11 C.F.R. § 104.1(a) by
23 failing to disclose expenditures or comply with the Act's source prohibitions;

2. Find no reason to believe the Save Jobs Party and Jack Davis, in his official capacity as treasurer, violated 2 U.S.C. § 434(b)(5)(a) by failing to adequately identify the purpose for its expenditures;
3. Find no reason to believe Jack Davis and the Save Jobs Party and Jack Davis, in his official capacity as treasurer, violated 2 U.S.C. § 441a by making or knowingly receiving excessive contributions;
4. Find no reason to believe the Save American Jobs Association, I Squared R Element, and Save Jobs Party and Jack Davis, in his official capacity as treasurer, violated 2 U.S.C. § 441b by making or knowingly receiving prohibited contributions;
5. Find no reason to believe Davis for Congress (formerly known as Jack Davis Exploratory Committee, Inc.) and Alan J. Davis, in his official capacity as treasurer, violated 2 U.S.C. § 441b by knowingly receiving prohibited corporate contributions from the Save American Jobs Association;
6. Find reason to believe the Save American Jobs Association violated 2 U.S.C. § 441b by making prohibited contributions, admonish the respondents, and take no further action;
7. Find no reason to believe that the Save American Jobs PAC and Davis for Congress (formerly known as Jack Davis Exploratory Committee, Inc.) and Alan J. Davis, in his official capacity as treasurer, violated 2 U.S.C. § 441b by making and knowingly receiving prohibited contributions;
8. Find reason to believe that Davis for Congress (formerly known as Jack Davis Exploratory Committee, Inc.) and Alan J. Davis, in his official capacity as treasurer, violated 2 U.S.C. § 434(b) by failing to report in-kind contributions received during the testing the waters period;
9. Find reason to believe Jack Davis violated 2 U.S.C. §§ 432(e)(1) and 433 by failing to timely register as a candidate and timely register a committee and file disclosure reports;
10. Find reason to believe Davis for Congress (formerly known as Jack Davis Exploratory Committee, Inc.) and Alan J. Davis, in his official capacity as treasurer, violated 2 U.S.C. §§ 433 and 434(a) by failing to timely register and disclose its activities;
11. Dismiss the allegation that Jack Davis and Davis for Congress (formerly known as Jack Davis Exploratory Committee, Inc.) and Alan J. Davis, in his official capacity as treasurer, violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11(a) by failing to include the required disclaimer;
12. Find no reason to believe the Save Jobs Party and Jack Davis, in his official capacity as treasurer, the Save American Jobs Association, and Davis for Congress (formerly known as Jack Davis Exploratory Committee, Inc.) and Alan J. Davis, in his official

capacity as treasurer, violated 2 U.S.C. § 441a by exceeding the contribution limits for affiliated committees;

13. Close the file as to I Squared R Element, Inc., Save American Jobs PAC, the Save Jobs Party and Jack Davis, in his official capacity as treasurer, and Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer;

14. Approve the attached factual and legal analyses;

15.

16. Approve the appropriate letters.

Lawrence H. Norton
General Counsel

11/20/06
Date

By:

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Rhonda J. Vosdingh
Associate General Counsel for Enforcement

Ann Marie Terzaken
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Attachments

- Attachment 1, Factual and Legal Analysis – Save American Jobs Association
- Attachment 2, Factual and Legal Analysis – Davis for Congress and Alan J. Davis
- Attachment 3, Factual and Legal Analysis – Jack Davis